b. Contrary to petitioner's contention (Pet. 16-17), the court of appeals' resolution of the question presented here does not conflict with either *United States* v. *Bornfield*, 145 F.3d 1123 (10th Cir. 1998), cert. denied, 528 U.S. 1139 (2000), or *United States* v. *Gilbert*, 244 F.3d 888 (11th Cir. 2001). In *Bornfield*, the jury rendered a special verdict of forfeiture with respect to the funds contained in the defendant's business account, even though the money-laundering offense for which the defendant was convicted involved only his personal account. See 145 F.3d at 1137-1138. The court of appeals held that the jury's special verdict, which apparently resulted from confusion between the account numbers of the business and personal accounts, "is clear error because the jury could not legally order the forfeiture of funds contained in Bornfield's business account." *Id.* at

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determinations under the Sixth Amendment, the government must prove forfeitability beyond a reasonable doubt. Pet. 15-16, 19-20. Petitioner's briefs in the court of appeals did not raise that claim, see Pet. C.A. Br. 45-55 (discussion of forfeiture issue); Pet. C.A. Reply Br. 18-21 (same), and the question therefore is not properly presented here. In any event, petitioner cites no decision of this Court that has required proof beyond a reasonable doubt in a criminal case with respect to a finding as to which no jury trial is required by the Sixth Amendment. To the contrary, this Court has treated the two requirements as interlinked. See, *e.g.*, *United States* v. *Gaudin*, 515 U.S. 506, 510, 522-523 (1995). The cases cited by petitioner (Pet. 19-20) all predated this Court's decision in *Libretti*. In most of those cases, moreover, the applicability of a reasonable-doubt standard was either assumed or conceded. The only one of those cases in which the point was actively contested was *United States* v. *Pelullo*, 14 F.3d 881 (3rd Cir. 1994), and the court in that case specifically limited its holding to criminal forfeitures under RICO. See *id.* at 903 (acknowledging but distinguishing Third Circuit's prior holding that preponderance standard applies to determinations of forfeitability under the Continuing Criminal Enterprise Act).

1138. The court further held that, absent a valid initial order of forfeiture, the district court could not order forfeiture pursuant to the substitute-assets provisions of 18 U.S.C. 982(b)(1)(A) and 21 U.S.C. 853(p). 145 F.3d at 1138-1139.

In *Gilbert*, the Eleventh Circuit concluded that the jury's forfeiture verdict was invalid because it encompassed an entire business, rather than simply the defendants' ownership interests in that business, notwithstanding uncontradicted evidence that part of the business was owned by an innocent party. 244 F.3d at 920-921. The court of appeals further held that the district court could not correct the error by entering an order of forfeiture limited to the defendants' ownership interests. *Id.* at 922. The court explained that, "[s]ince the jury's verdict reached beyond those assets that were legally forfeitable under the applicable statute, the verdict was invalid. Without a valid *verdict* of forfeiture, the district court cannot properly enter an *order* of forfeiture unless the defendant waives his right to a jury trial on that issue." *Ibid.*

Because neither *Bornfield* nor *Gilbert* was based on the Sixth Amendment, those decisions cannot reasonably be thought to conflict with the Seventh Circuit's disposition of the constitutional question in this case. And because current Federal Rule of Criminal Procedure 32.2 was not in effect at the time of the forfeitures at issue in *Bornfield* and *Gilbert*, the courts in those cases had no occasion to discuss that Rule's allocation of authority between the trial court and the jury.

In any event, the defect in the forfeiture verdict rendered by petitioner's jury is significantly different from the defects involved in *Bornfield* and *Gilbert*. In each of those cases, the jury's forfeiture verdict encompassed

discrete assets that had no legally sufficient nexus to the offenses of conviction. No such error occurred in this case; rather, the district court found that the jury had incorrectly computed the *amount* of the forfeitable funds by double-counting monies used in more than one transaction. The jury's computation of the forfeitable amount was apparently based on the premise, which the district court rejected, that the jury could "count the same money more than once if it was involved in more than one transaction." Pet. App. B7; see *id.* at B7-B10. Pursuant to Federal Rule of Criminal Procedure 32.2(b)(1), the district court conducted a hearing to "determine the amount of money that [petitioner] will be ordered to pay," at which it placed upon the government the "burden to show how much of the jury's verdict reflected money that was not double counted," Pet. App. B10. But all of the funds ultimately ordered to be forfeited had been properly found by the jury to have the requisite nexus to the offenses of conviction.

2. Petitioner contends (Pet. 21-30) that the amount he was required to forfeit should have been offset by the sum forfeited by Pede and D'Ambrosia upon the sale of GMS. Because the amount forfeited by Pede and D'Ambrosia was greater than the amount that petitioner was ordered to forfeit, the effect of such an offset would have been to eliminate petitioner's forfeiture obligation altogether. See Pet. App. A8-A9. Petitioner argues (Pet. 21) that, as a result of the lower courts' refusal to approve an offset, the government has obtained an impermissible "double recovery of the same property." Petitioner's claim lacks merit and raises no significant legal issue warranting this Court's review.

In holding that an offset was inappropriate in this case, the court of appeals accepted petitioner's basic

legal contention that the government is not entitled to forfeiture of more than the total proceeds of the various defendants' unlawful activities. The court explained that, "[i]f the United States already has all of the boodle, having collected it from Pede and D'Ambrosia, then the funds in [petitioner's] hands * * * cannot also be traceable proceeds." Pet. App. A9. The court concluded, however, that "[t]he district judge's concrete findings establish that the $2.8 million forfeited in this prosecution is distinct from the assets that Pede and D'Ambrosia have surrendered." *Id.* at A10. To the extent that petitioner challenges the court of appeals' application of the relevant legal principles to the particular record in this case, his factbound claim provides no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
ELIZABETH A. OLSON
Attorney

NOVEMBER 2005

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No. 05-312

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID H. TEDDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

PETER GOLDBERGER
Counsel of Record
LAW OFFICES OF
ALAN ELLIS
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 658-2255

DAVID B. SMITH
ENGLISH & SMITH
Courthouse Square
526 King St., Suite 213
Alexandria, VA 22314
(703) 548-8911

Attorneys for Petitioner

November 2005

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ARGUMENT IN REPLY

David Hampton Tedder has petitioned this Court for a writ of certiorari to review the judgment and opinion of the Seventh Circuit. The court below held that he was not unconstitutionally deprived of his right to jury trial on a criminal forfeiture claim, arising out of a conviction for conspiracy to commit money laundering. 18 U.S.C. § 1956(h). The respondent does not deny the importance of the question. It simply asserts that a number of circuits have decided the point more or less in keeping with the decision by Judge Easterbrook for the Seventh Circuit in this case. But the respondent does not attempt to defend in any way the reasoning or conclusion of those courts against any of the arguments articulated in the Petition. The Brief in Opposition takes a different tack: it refuses to address the question presented,[1] and instead advances several arguments -- many of them never advanced by the government in the trial court or in the court of appeals, nor by either court *sua sponte* -- in support of its theme that the question proposed in the Petition is not presented on the facts and record of this case. Because the respondent's attempts to avoid the question presented miss the mark, the petition should be granted.

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[1] The respondent proposes a revision of the Questions, Br.Opp. (i), to make them seem fact-bound and case-specific, and the matter accordingly less worthy of this Court's attention. The Questions Presented in the Petition, of course, are the ones the Court would and should address if the writ is granted.

The brief in opposition ("Br.Opp.") proposes two reasons why certiorari should be denied. First, the respondent asserts the matter was settled in *Libretti v. United States*, 516 U.S. 29, 49 (1995), and that *Apprendi v. New Jersey*, 530 U.S. 446 (2000), and its progeny do not overrule *Libretti* because they only apply to "determinate sentencing regimes." Br. Opp. 5-7. Second, the respondent claims that the conflict with two other Circuits which petitioner identifies over the trial court's power to revise a jury verdict on the amount of a forfeiture does not amount to a circuit split. Br.Opp. 8-10. The second point raised in the petition arises out of the odd manner in which the issue was resolved by the court below. The underlying, interrelated aspects of the law of forfeiture are been the subject of significant misinterpretations by numerous courts. Pet. 21-30. Yet the respondent disregards everything that petitioner has to say about why the Court should address these issues. Br.Opp. 10-11. The government's contentions are not persuasive and do not justify denial of the petition.

1. The Sixth Amendment issue is important and should be resolved by this Court, even though no Circuit has yet addressed it correctly.

The petition in this case demonstrates that none of the Circuits -- most of them following the lead of the Court below, as articulated in earlier cases -- have properly applied this Court's precedents to the problem of adding criminal forfeiture as part of a criminal sentencing. The facts giving rise to the conviction -- that is, the elements of the offense -- do not authorize the

imposition of a forfeiture penalty unless additional facts are proven. In this case, those additional facts are not, as the respondent and the circuits attempt to suggest, that certain property was actually "involved in" the money laundering conspiracy which constituted the proceeds of the co-defendants' illegal gambling business, and that petitioner Tedder had a present interest in some or all of that property (or other "property traceable to such property"). 18 U.S.C. § 982(a)(1).

That as many as eight circuits have already failed to apply fairly the principle of *Apprendi*, as explained more recently in *Blakely v. Washington*, 542 U.S. 246 (2004), to the added penalty of criminal forfeiture hardly justifies this Court's staying its hand. The Court has not hesitated before to correct a virtually unanimous trend toward error in the Circuits. See, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135 (1994) (reversing ten circuits); *McNally v. United States*, 483 U.S. 350 (1987) (same).

In repeating the red herring that "The amount of money or other property that a federal criminal defendant may be required to forfeit, however, is not subject to any statutory maximum," Br.Opp. 7, the respondent simply ignores -- and does not answer -- the petitioner's showing that this formulation misses the point of *Blakely*. It is not so much, in this case, the addition of a higher amount of forfeiture to a lower amount that triggers the right to jury trial, but the addition of *any forfeiture* at all to a sentence which, without proof of additional facts beyond those found by the jury when it rendered the conviction, supports *no* criminal forfeiture.

As stated in the petition:

> It is the offense which authorizes a "statutory maximum" as a result of certain facts' being proved. The offense in question is not "forfeiture"; the offense (in this case, for example) is conspiracy to commit money laundering, 18 U.S.C. § 1956(h). ... Proof of the elements of the ... offense charged ..., without more, implicates a maximum penalty of ten years' imprisonment and a $250,000 fine ..., as well as a special assessment, *id.* § 3013, but not a forfeiture. ... Forfeiture thus increases the maximum sentence otherwise available for the money laundering conspiracy offense, and does so on the basis of proof of additional facts.

Pet. 14-15. To this simple rebuttal of the majority view, the respondent offers no direct response.

The respondent also attempts to invoke this Court's own authority in the matter, but that effort misses the mark. *Libretti* was decided five years prior to *Apprendi*, and has not been cited since. It involved the requirements for a guilty plea, not the constitutional limits on sentencing following a trial. Certainly, a case that turns on the proposition that Sixth Amendment rights are not implicated by a sentencing issue cannot safely be relied upon as decisive today.

The respondent also misconstrues the import of the Court's remark in *United States v. Booker*, 543 U.S. --, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), that 18 U.S.C. § 3554 is "perfectly valid." Br.Opp. 7, *citing* 125 S.Ct. at 764. Of course it is. That statute says only that,

"The Court, in imposing sentence on a defendant who has been found guilty of an offense [under the federal drug or RICO statutes] shall order in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States ...." This law says nothing about the procedures by which the nature and amount of that forfeitable property must have been determined.[2] After a jury properly determines what property a defendant must forfeit criminally, it is still the task of the judge at sentencing to include the forfeiture obligation in the judgment as part of the sentence.

The petitioner here was not afforded a trial by jury on the added facts necessary to increase the available punishment, nor to determine the amount of that penalty. Instead, the district court held a jury trial to determine the total amount of property "involved in" the (conspiracy) offense, with no reference to what interest the defendant might have in that property or anything derived from that property. Although constitutionally inadequate, the district court's initial action comported with Fed.R.Crim.P. 32.2(b)(4). Then, upon realizing it had instructed the jury erroneously in several respects, the district court proceeded to redetermine the verdict without holding a new trial. The latter step conflicted with published authority in two other circuits. *See* Pet. 16-17. That those cases were resolved on the basis that the federal forfeiture statutes require constitutional, rather than unconstitutional, procedures hardly proves

[2] In any event, neither type of forfeiture covered by § 3554 is involved in this case.

that they do not conflict with the decision below. *Compare* Br.Opp. 8-10.

The petition also seeks to have this Court re-establish the reasonable doubt standard for criminal forfeitures. That requirement ordinarily goes hand in hand with a jury trial right, as respondent notes. Br.Opp. 8 n.2. Yet the two are not necessarily intertwined. The respondent complains that "petitioner cites no decision of this Court that has required proof beyond a reasonable doubt in a criminal case with respect to a finding as to which no jury trial is required by the Sixth Amendment." *Id.* That is an odd remark; by focusing on what petitioner cited, and limiting it to "criminal case[s]," the respondent renders its point hollow. After all, this Court's leading authority pointing out the constitutional nature of the reasonable doubt standard is precisely such a case: *In re Winship*, 397 U.S. 358 (1970) (reasonable doubt standard, but not jury trial, guaranteed in juvenile delinquency case).

Thus, while "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), the two are not identical or inherently interdependent. Contrary to the Solicitor General's suggestion, examples abound. Thus, while no right to jury trial attaches to a petty offense, the burden of proof remains beyond a reasonable doubt. *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 n.5 (1988). The same is true at a criminal contempt proceed where the punishment imposed does not exceed six months. See *Bloom v. Illinois*, 391 U.S. 194, 205 (1968), quoting *Gompers v. Buck Stove & Range Co.*,

221 U.S. 418, 444 (1911); *cf. United States v. Dixon*, 509 U.S. 688, 696 (1993) (noting the point). Likewise, when a defendant waives his right to trial by jury, the resulting bench trial must nevertheless end in acquittal if the government does not present proof beyond a reasonable doubt. See *Moore v. United States*, 429 U.S. 20, 22 (1976) (per curiam) (calling this an "elementary proposition" and summarily reversing conviction).

The petition explains in detail why the writ should be granted in this case. The respondent fails to persuade otherwise.

2. The respondent's attempts to mask the nature of the second question presented should not prevail.

The respondent opposes a grant of certiorari in this case on petitioner's other issue by ignoring the second Question Presented entirely:

> 2. If, as held by the court below in disagreement with the trial court, the same property, or its value, may not be ordered forfeited criminally from different individuals in separate cases on different statutory bases, may the court of appeals nevertheless affirm a forfeiture judgment entered over such objection on the basis of a rhetorical question (masking a factual assumption) never raised by the government and which the defendant-appellant was never given an opportunity to rebut?

Pet. i. What makes this case interesting and worthy of this Court's review on this point is not "the court of

appeals' application of the relevant legal principles to the particular record in this case," Br.Opp. 11, but rather the unfairness of the court below in deciding the point on the basis of a rhetorical question which is easily answered (*see* Pet. 24-25) but to which appellant was never allowed to give his response.[3] Moreover, as the petition goes on to demonstrate, there are implicated in the question which was thus wrongly pretermitted a number of significant and unresolved issues regarding the proper and constitutional application of the increasingly popular criminal forfeiture remedy.

In pretending that the petition's second point is only a mundane, fact bound complaint, the respondent completely ignores the legal invalidity of the so-called "personal money judgment" forfeiture imposed in this case, which was directly tied to the nature of the district court's error and was made to appear moot by the court of appeals' unfair disposition. Nor does the respondent fail to mention, much less justify, that because the government has never complied with its obligation to notify third parties under 21 U.S.C. § 853(n), the petitioner is left with an order that he "forfeit" not only any tainted property he may possess, but <u>everything</u> he and his family (and a business he was found to control) may own, up to the total value of all forfeitable property

[3] Not only was the determinative point not raised in the government's brief, but it was also not raised from the bench at oral argument. After the decision was rendered, the panel even denied a motion for an extension of time to file a petition for rehearing (in which petitioner sought to raise this point, among others), and then refused to reconsider that ruling.

resulting from the entire conspiracy. This complete disconnection between criminal forfeiture and any actual, forfeitable property in which the particular defendant has an interest, defies the nature of the remedy as described in the applicable statutes.

For these reasons as well, the Court should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
LAW OFFICES OF
ALAN ELLIS
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 658-2255

DAVID B. SMITH
ENGLISH & SMITH
Courthouse Square
526 King St., Suite 213
Alexandria, VA 22314
(703) 548-8911

Attorneys for Petitioner

November 21, 2005